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DOD's National Security Personnel System: Provisions of Law and Implementation Plans

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DOD's National Security Personnel System: Provisions of Law and Implementation Plans

Summary

Title XI of the National Defense Authorization Act for FY2004, P.L. 108-136, includes provisions on a National Security Personnel System (NSPS) for the Department of Defense (DOD) and provisions on personnel management that are applicable government-wide. The law was enacted on November 24, 2003.

Title XI, Subtitle A, of the law authorizes the Secretary of Defense and the Director of the Office of Personnel Management (OPM) to establish a new human resources management (HRM) system for DOD's civilian employees and to jointly prescribe regulations for the system. The Secretary and the Director are authorized to establish and adjust a labor relations system and are required to provide a written description of the proposed personnel system or any adjustments to such system to the labor organizations representing DOD employees. A collaboration procedure must be followed by the Secretary, Director, and employee representatives. The Secretary is authorized to engage in any collaboration activities and collective bargaining at an organizational level above the level of exclusive recognition. The Secretary also is authorized to establish an appeals process that provides fair treatment for DOD employees covered by the NSPS. Regulations applicable to employee misconduct or performance that fails to meet expectations may not be prescribed until after the Secretary consults with the Merit Systems Protections Board (MSPB) and must afford due process protections and conform to public employment principles of merit and fitness at 5 U.S.C. §3201. A qualifying employee subject to some severe disciplinary actions may petition the MSPB for review of the department's decision. The board could dismiss any petition that does not raise a substantial question of fact or law and order corrective action only if the board finds that the department's personnel decision did not meet some prescribed standards. An employee adversely affected by a final decision or order of the board could obtain judicial review.

Subtitle C of Title XI includes amendments to the government-wide policies for the federal employee overtime pay cap, military leave, and Senior Executive Service pay, and creates a Human Capital Performance Fund to reward the highest-performing and most valuable employees in an agency.

Secretary of Defense Donald Rumsfeld named Navy Secretary Gordon England as the DOD official who is responsible for negotiating with labor organizations on the personnel reform effort. On April 14, 2004, Secretary England announced that implementation of the NSPS would be phased in over several years, beginning with a six-month pilot program in June or July 2005. Employee groups and OPM will be consulted by DOD, and details of the new system will be published in the *Federal Register*. According to Mr. England, the tentative schedule calls for regulations for the labor relations system to be published in November 2004 and for the HRM system to be published in January 2005.

This report discusses each of the provisions in Title XI of P.L. 108-136 and plans to implement the law.

Contents

Introduction	1
Implementation of Title XI of P.L. 108-136	4
Department of Defense National Security Personnel System —	
Title XI, Subtitle A, of P.L. 108-136	6
Section 9901. Definitions	6
Section 9902. Establishment of Human Resources Management System ...	6
In General	6
Requirements for the HRM System	6
Personnel Management at Defense Laboratories	9
Limitations Relating to Pay	9
Provisions to Ensure Collaboration With Employee Representatives on National Security Personnel System	13
Provisions Regarding National Level Bargaining	14
Provisions to Ensure Collaboration With Employee Representatives on Development of Labor Relations System	14
Provisions Relating to Appellate Procedures	16
Provisions Related to Separation and Retirement Incentives	18
Provisions Relating to Reemployment	20
Additional Provisions Relating to Personnel Management	21
Phase-In	22
Section 9903. Attracting Highly Qualified Experts	22
Implementation	23
Section 9904. Special Pay and Benefits for Certain Employees	
Outside the United States	24
Impact on Department of Defense Civilian Personnel	25
Department of Defense Civilian Personnel Generally —	
Title XI, Subtitle B, of P.L. 108-136	25
Military Leave for Mobilized Federal Civilian Employees	25
Extension of Authority for Experimental Personnel Program for Scientific and Technical Personnel	26
Department of Defense Civilian Personnel Generally —	
Title XI, Subtitle C, of P.L. 108-136	26
Modification of the Overtime Pay Cap	26
Implementation	26
Common Occupational and Health Standards for Differential Payments as a Consequence of Exposure to Asbestos	27
Implementation	27
Increase in Annual Student Loan Repayment Authority	27
Implementation	28
Authorization for Cabinet Secretaries, Secretaries of Military Departments, and Heads of Executive Agencies to be Paid on a Biweekly Basis ...	28
Implementation	28
Senior Executive Service and Performance	29
Post-Employment Restrictions	30

Design Elements of Pay-for-Performance Systems in Demonstration Projects	30
Federal Flexible Benefits Plan Administrative Costs	31
Implementation	32
Employee Surveys	33
Human Capital Performance Fund	33
Other Personnel Provisions	36
Contracting For Personal Services	36
Transfer of Personnel Investigative Functions and Related Personnel of the Department of Defense	36
Appendix	38
Key CRS Policy Staff	43

List of Tables

Table 1. Career Groups and Pay Bands for Nonsupervisory Employees, Science and Technology Reinvention Laboratories, Department of Defense	38
Table 2. Career Groups and Pay Bands for Supervisory Employees, Science and Technology Reinvention Laboratories, Department of Defense	39
Table 3. Selected Features of the Pay-for-Performance Evaluation System, Science and Technology Reinvention Laboratories, Department of Defense	41

DOD's National Security Personnel System: Provisions of Law and Implementation Plans

Introduction

In April 2003, the Department of Defense (DOD) sent a proposal entitled “The Defense Transformation for the 21st Century Act” to Congress.¹ Changes in the uniformed military personnel and acquisition systems were the principal focus of the proposal. However, it also recommended changes to the statutory bases for much of DOD's civilian personnel system, which covers some 700,000 civilian employees (about 26% of federal civilian executive branch personnel worldwide).²

On May 22, 2003, the House of Representatives passed H.R. 1588, the National Defense Authorization Act for FY2004, amended, by a 361 to 68 (Roll No. 221) vote.³ As reported to the House, H.R. 1588 included provisions at Subtitle A of Title XI related to government-wide personnel management. The bill also included provisions for a National Security Personnel System (NSPS) for DOD at Subtitle B. Many of the provisions had originated in DOD's April 2003 proposal and had been included in H.R. 1836, the Civil Service and National Security Personnel Improvement Act, reported to the House, amended (H.Rept. 108-116, part 1), by the Committee on Government Reform on May 19, 2003.⁴ The provisions were added to H.R. 1588 during Armed Services Committee markup.⁵ Several additional amendments were made to the personnel management provisions during House consideration and passage of H.R. 1588. The Senate version of the defense

¹ The text of the DOD proposal can be accessed at [<http://www.defenselink.mil/dodgc/lrs/docs/Transformation.pdf>], visited June 10, 2003.

² An April 2004 letter to DOD employees by David Chu, Under Secretary of Defense for Personnel and Readiness, and Gordon England, Secretary of the Navy, refers to 700,000 civilian employees to be covered by the National Security Personnel System. Available on the Internet at [<http://www.cpms.osd.mil/nsps/index.html>], visited Apr. 27, 2004.

³ H.R. 1588 was introduced by Representative Duncan Hunter, by request, on April 3, 2003, and was referred to the House Committee on Armed Services. The Committee marked up the bill on May 9 and May 14, 2003. H.R. 1588 was reported to the House, amended (H.Rept. 108-106) on May 16, 2003.

⁴ U.S. Congress, House Committee on Government Reform, *Civil Service and National Security Personnel Improvement Act*, report to accompany H.R. 1836, 108th Cong., 1st sess., H.Rept. 108-116, part 1 (Washington: GPO, 2003). Hereafter referred to as H.Rept. 108-116, part 1.

⁵ H.R. 1836 was introduced by Representative Tom Davis on April 29, 2003, and was referred to the House Committees on Armed Services, Government Reform, and Science. The Government Reform Committee marked up the bill on May 7, 2003.

authorization bill, S. 1050, as passed by the Senate, amended, on May 22, 2003, on a 98 to 1 (No. 194) vote, did not include these Title XI personnel management provisions (but included other personnel provisions at Title XI). On June 4, 2003, the Senate struck all after the enacting clause and substituted the text of S. 1050 in H.R. 1588. The Senate then passed H.R. 1588, amended, by voice vote the same day.⁶ H.R. 1588, as passed by the Senate, included, at Title XI, personnel provisions on pay authority for critical positions, the experimental personnel program for scientific and technical personnel, and personnel investigations that were not included in the House-passed version of the bill or S. 1166.

Senator Susan Collins, Chairman of the Senate Committee on Governmental Affairs, introduced S. 1166, the National Security Personnel System Act, on June 2, 2003, and it was referred to the Senate Governmental Affairs Committee. On June 4, 2003, the committee conducted a hearing on the bill. Following the hearing, Senators Voinovich and Thomas Carper asked the Comptroller General, David Walker, to respond to several additional questions. His response, submitted on July 3, 2003, included the following comments.

[I]t is critical that agencies or components have in place the human capital infrastructure and safeguards before implementing new human capital reforms. This institutional infrastructure includes, at a minimum (1) a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program mission, goals, and desired outcomes, (2) the capabilities to develop and implement a new human capital system effectively, and (3) a modern, effective, credible and, as appropriate, validated performance appraisal and management system that includes adequate safeguards, such as reasonable transparency and appropriate accountability mechanisms, to ensure the fair, effective, and nondiscriminatory implementation of the system.

Although we do not believe that DOD should wait for the full implementation of the new human capital system at the Department of Homeland Security (DHS), ... we do think that there are important lessons that can be learned from how DHS is developing its new personnel system. For example, DHS has implemented an approach that includes a design team of employees from DHS, the Office of Personnel Management (OPM), and major labor unions. To further involve employees, DHS has conducted a series of town hall meetings around the country and held focus groups to further learn of employees' views and comments ... DOD ... needs to ensure that employees are involved in order to obtain their ideas and gain adequate "buy-in" for any related transformational efforts.

[W]e suggest that DOD also be required to link its performance management system to program and performance goals and desired outcomes.... [This] helps the organization ensure that its efforts are properly aligned and reinforces the line of sight between individual performance and organizational success so that an individual can see how her/his daily responsibilities contribute to results and outcomes.

⁶ S. 1050 was introduced by Senator John Warner and reported to the Senate (S.Rept. 108-46) by the Committee on Armed Services on May 13, 2003. Earlier, on May 7 and 8, 2003, the Armed Services Committee marked up the bill.

In our view, it would be preferable to employ a governmentwide approach to address certain flexibilities that have broad-based application and serious potential implications for the civil service system broad banding, pay for performance, reemployment, and pension offset waivers. In these situations, it may be prudent and preferable for Congress to provide such authorities on a governmentwide basis and in a manner that assures that a sufficient personnel infrastructure and appropriate safeguards are in place before an agency implements the new authorities.

Based on our experience, while DOD's leadership has the intent and the ability to transform the department, the needed institutional infrastructure is not in place in a vast majority of DOD organizations.... In the absence of the right institutional infrastructure, granting additional human capital authorities will provide little advantage and could actually end up doing damage if the authorities are not implemented properly by the respective department or agency.⁷

The Senate Governmental Affairs Committee marked up the bill on June 17, 2003, and, on the same day, ordered S. 1166 to be reported to the Senate, amended, on a 10 to 1 roll call vote. During the mark-up, the committee agreed to an amendment offered by Senator Joseph Lieberman to clarify the intent of the bill's provisions on collective bargaining and an amendment offered by Senator George Voinovich to exclude 10 DOD laboratories from the NSPS. Both amendments were agreed to by voice vote. On September 5, 2003, the committee reported S. 1166 to the Senate with amendments and without a written report.

Senator Collins, a conferee on the conference committee for H.R. 1588, along with Senators Voinovich and Carl Levin (an H.R. 1588 conferee), among others, expressed the hope that the provisions of S. 1166, as amended, would be seriously considered by the conference as an alternative to the provisions in H.R. 1588 on the NSPS. On July 14, 2003, Senators Collins, Voinovich, Stevens, and Sununu wrote a letter to their Senate colleagues expressing their support for, and sharing their views on, the personnel provisions of S. 1166. They stated that, "[a]s a template for future governmentwide civilian personnel reform, the personnel provisions in the defense bill must strike the right balance between promoting a flexible system and protecting the rights of our constituents who serve in the federal civil service" and that "[w]e believe that our proposal strikes such a balance."⁸ Several provisions that were the same or similar to S. 1166 were added to H.R. 1588 in conference.

On November 7, 2003, the House agreed to the conference report (H.Rept. 108-354) accompanying H.R. 1588 on a 362-40, 2 present (Roll No. 617) vote. The Senate agreed to the conference report on a 95-3 (No. 447) vote on November 12, 2003. President Bush signed H.R. 1588 into law on November 24, 2003, as P.L. 108-136 (117 Stat. 1392).

⁷ U.S. General Accounting Office, *Posthearing Questions Related to Proposed Department of Defense (DOD) Human Capital Reform*, GAO-03-965R (Washington: July 3, 2003).

⁸ Letter from Senators Susan Collins, George Voinovich, Ted Stevens, and John Sununu to Senate colleagues, July 14, 2003. Provided to CRS by the Senate Committee on Governmental Affairs by facsimile.

This report discusses each of the provisions in Title XI of P.L. 108-136 and plans to implement the law.⁹ For discussion of the background to the provisions and side-by-side comparisons of the provisions with current law, see CRS Report RL31805, *Authorization and Appropriations for FY2004: Defense*, by Amy Belasco and Stephen Daggett; CRS General Distribution Memorandum, *Department of Defense Transformation Proposal (Title I, Subtitle A, Section 101) and H.R. 1588 Conference Report (Title XI, Subtitles A,B,C): A Side-by-Side Comparison*, coordinated by Barbara L. Schwemle; CRS Report RL31924, *Civil Service Reform — H.R. 1836, Homeland Security Act, and Current Law*, by Barbara L. Schwemle and Thomas J. Nicola; and CRS Report RL31916, *Defense Department Original Transformation Proposal: Compared to Existing Law*, by Robert L. Goldich, Gary J. Pagliano, Barbara L. Schwemle, and Thomas J. Nicola.

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Implementation of Title XI of P.L. 108-136

Discussions on implementation of the NSPS began in January 2004.¹⁰ In early February 2004, Secretary of Defense Donald Rumsfeld named Navy Secretary Gordon England as the DOD official who is responsible for negotiating with labor organizations on the personnel reform effort. On April 14, 2004, Secretary England announced that implementation of the NSPS would be phased in over several years, beginning with a six-month pilot program in June or July 2005. A formal evaluation would occur after the pilot. Employees would be added to the system in additional phases, so that all employees would be covered by the NSPS by October 1, 2006. The Department of the Navy and the U.S. Marine Corps are expected to be among the first components to be covered by the NSPS. Employee groups and OPM will be consulted by DOD, and details of the new system will be published in the *Federal Register*. According to Mr. England, the tentative schedule calls for regulations for the labor relations system to be published in November 2004 and for the HRM system to be published in January 2005.¹¹ The *Federal Times* reported that “[a]bout

⁹ Sections 1111 (automated personnel management program), 1112 (demonstration project relating to certain acquisition personnel management), 1114 (restoration of annual leave to certain DOD employees affected by base closings), and 1115 (employment of certain civilian faculty members at a Defense institution) of Title XI, Subtitle B, of P.L. 108-136 are beyond the purview of this report.

¹⁰ Tim Kauffman, “Union-busting, DOD Style: Work-force Plan Would Slash Unions’ Membership, Influence,” *Federal Times*, Feb. 16, 2004. Available on the Internet at [<http://www.federtimes.com>], visited Apr. 27, 2004.

¹¹ Shawn Zeller, “Pentagon Slows Schedule for Rolling Out New Personnel System,” Apr. 14, 2004. Available on the Internet at [<http://www.govexec.com>], visited Apr. 27, 2004. See also “NSPS Design and Implementation Plan,” Apr. 15, 2004. Available on the Internet at [<http://www.cpms.osd.mil/nsps/index.html>], visited Apr. 27, 2004. Initially, DOD was aiming to publish details of the new system by April 2004 and cover 300,000 civilian DOD

(continued...)

125 people from Defense, OPM, and OMB [Office of Management and Budget] developed the new schedule for designing the system” and that, according to Secretary England, “Town Hall meetings, webcasts, employee surveys and other methods will be used to involve employees in the creation of the new system.”¹² On February 13, 2004, OPM Director Kay Coles James named George Nesterchuk as a senior advisor and announced that he would serve as the lead OPM official on design of the NSPS. Other specific implementation steps are noted below under relevant sections of the law. DOD has established a website to monitor implementation of the NSPS.¹³

Prior to the enactment of the provisions authorizing the Department of Defense to create a new human resources management system, DOD civilians were covered by the personnel laws codified in Title 5 *United States Code* on government organization and employees. Under the authority granted by Title XI of P.L. 108-136, some 700,000 civilian employees are expected to be covered by the new National Security Personnel System. It is anticipated that the NSPS policies (especially in the areas of pay, performance management, adverse actions and appeals, and labor management relations) will be more flexible than those under Title 5. During debate prior to the enactment of P.L. 108-136 and in discussions that have continued since, several Members of Congress stated that implementation of the NSPS (along with the Department of Homeland Security’s new HRM system currently being created) should be monitored as a possible model for amending Title 5 and extending those provisions to the rest of the federal government’s civilian workforce.

Reflecting the importance of carefully crafting the NSPS, Senators Susan Collins, Carl Levin, Ted Stevens, John Sununu, and George Voinovich reportedly sent a letter to Secretary England on March 3, 2004, which stated that:

[t]he involvement of the civilian work force in the design of the new National Security Personnel System is critical to its ultimate acceptance and successful implementation. Full collaboration with the Office of Personnel Management and the federal employee unions will assist the department in meeting this critical challenge.¹⁴

A March 12, 2004, letter sent by Senator Daniel Akaka to Secretary of Defense Donald Rumsfeld urged DOD to issue all proposals on the NSPS in the *Federal*

¹¹ (...continued)
employees under the NSPS by October 1, 2003.

¹² Tim Kauffman, “Pentagon Scales Back Personnel Reform Plan,” *Federal Times*, Apr. 19, 2004. Available on the Internet at [<http://www.federaltimes.com>], visited Apr. 27, 2004.

¹³ See [<http://www.cpms.osd.mil/nsps/index.html>], visited Apr. 27, 2004.

¹⁴ Tim Kauffman, “DOD Personnel Plan Under Fire From Lawmakers, Unions,” *Federal Times*, Mar. 8, 2004. Available on the Internet at [<http://www.federaltimes.com>], visited Apr. 27, 2004.

Register and not as internal regulations, for reasons of “openness, transparency, public comment, and scrutiny of the details.”¹⁵

Department of Defense National Security Personnel System — Title XI, Subtitle A, of P.L. 108-136

P.L. 108-136 provides the following.¹⁶

Section 1101(a)(1) of P.L. 108-136 amends Part III, Subpart I, of Title 5 *United States Code* by adding a new Chapter 99 entitled Department of Defense (DOD) National Security Personnel System. The new system covers some 700,000 DOD civilian employees.

Section 9901. Definitions¹⁷

This section defines terms for the new chapter. “Director” means the Director of the Office of Personnel Management (OPM) and “Secretary” means the Secretary of Defense.

Section 9902. Establishment of Human Resources Management System¹⁸

In General. The new Section 9902(a) of P.L. 108-136 provides that notwithstanding any other provision of Part III, the Secretary of Defense may, in regulations prescribed jointly with the OPM Director, establish, and from time to time adjust, a human resources management (HRM) system, referred to as the National Security Personnel System (NSPS), for some or all of the organizational or functional units of DOD.

Requirements for the HRM System. The HRM system must be flexible and contemporary. The new Section 9902(b) provides that it could not waive, modify, or otherwise affect:

- the public employment principles of merit and fitness at 5 U.S.C. §2301, including the principles of hiring based on merit, fair

¹⁵ Senator Daniel Akaka, Press Release, “Akaka Queries Agencies on Personnel System Changes,” Mar. 23, 2004. Available on the Internet at [<http://akaka.senate.gov>], visited Apr. 27, 2004.

¹⁶ 117 Stat. 1621-1633. U.S. Congress, Conference Committees, 2003, *National Defense Authorization Act for Fiscal Year 2004*, conference report to accompany H.R. 1588, 108th Cong., 1st sess., H.Rept. 108-354 (Washington: GPO, 2003), pp. 162-163, 171-173, 232-256, 733, and 758-764.

¹⁷ 117 Stat. 1621.

¹⁸ 117 Stat. 1621-1631.

treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;

- any provision of 5 U.S.C. §2302, relating to prohibited personnel practices;
- any provision of law referred to in 5 U.S.C. §2302(b)(1)(8)(9); or any provision of law implementing any provision of law referred to in 5 U.S.C. §2302(b)(1)(8)(9) by providing for equal employment opportunity through affirmative action; or providing any right or remedy available to any employee or applicant for employment in the public service.

Various subparts and chapters of Part III of Title 5 *United States Code* which cannot be waived, modified, or otherwise affected in the new HRM system are listed at the new Section 9902(d) as follows:

Subpart A — General Provisions, including Chapter 21 Definitions; Chapter 23 Merit System Principles; Chapter 29 Commissions, Oaths, Records, and Reports;

Subpart B — Employment and Retention, including Chapter 31 Authority for Employment; Chapter 33 Examination, Selection, and Placement; Chapter 34 Part-time Career Employment Opportunities; Chapter 35 Retention Preference (RIF), Restoration, and Reemployment;

Subpart E — Attendance and Leave, including Chapter 61 Hours of Work; Chapter 63 Leave;

Subpart G — Insurance and Annuities, including Chapter 81 Compensation for Work Injuries; Chapters 83 and 84 Retirement; Chapter 85 Unemployment Compensation; Chapter 87 Life Insurance; Chapter 89 Health Insurance; Chapter 90 Long Term Care Insurance;

Subpart H — Access to Criminal History Record Information, including Chapter 91 for individuals under investigation;

Chapter 41 — Training;

Chapter 45 — Incentive Awards;

Chapter 47 — Personnel Research Programs and Demonstration Projects;

Chapter 55 — Pay Administration, including biweekly and monthly pay periods and computation of pay, advanced pay, and withholding of taxes from pay, except that Subchapter V of Chapter 55 on premium pay (overtime, night, Sunday pay), apart from section 5545b, may be waived or modified;

Chapter 57 — Travel, Transportation, and Subsistence;

Chapter 59 — Allowances, which includes uniforms, quarters, overseas differentials;

Chapter 71 — Labor Management and Employee Relations [H.R. 1588, as passed by the House, did not include this provision];

Chapter 72 — Antidiscrimination, Right to Petition Congress, including minority recruitment, antidiscrimination on the basis of marital status and handicapping condition, furnishing information to Congress;

Chapter 73 — Suitability, Security, and Conduct, including security clearance, political activities (Hatch Act), misconduct (gifts, drugs, alcohol);

Chapter 79 — Services to Employees, including safety program, protective clothing and equipment; or

any rule or regulation prescribed under any provision of law referred to in any of the statements in bullets immediately above.

Other requirements for the HRM system include that it must:

- ensure that employees may organize, bargain collectively as provided for in the proposed Chapter 99, and participate through labor organizations of their own choosing in decisions that affect them, subject to the provisions of the proposed Chapter 99 and any exclusion from coverage or limitation on negotiability established pursuant to law;
- not be limited by any specific law or authority under Title 5, or by any rule or regulation prescribed under Title 5, that is waived in regulations prescribed under the proposed Chapter 99, subject to the requirements stated above; and
- include a performance management system. Such a system must incorporate these elements: adherence to the merit principles of 5 U.S.C. §2301; a fair, credible, and transparent employee performance appraisal system; a link between the performance management system and the agency's strategic plan; and a means for ensuring employee involvement in the design and implementation of the system. Other elements the system must incorporate are: adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system; a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review; effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

and a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and a pay-for-performance evaluation system to better link individual pay to performance, and provide an equitable method for appraising and compensating employees.

Personnel Management at Defense Laboratories. The NSPS will not apply with respect to the laboratories listed below before October 1, 2008. It will apply on or after October 1, 2008, only to the extent that the Secretary determines that the flexibilities provided by the NSPS are greater than the flexibilities provided to those laboratories pursuant to section 342 of the National Defense Authorization Act for Fiscal Year 1995 (P.L.103-337) and section 1101 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (5 U.S.C. §3104 note) respectively. The laboratories covered by this provision (5 U.S.C. §9902(c)) are the Aviation and Missile Research Development and Engineering Center; the Army Research Laboratory; the Medical Research and Materiel Command; the Engineer Research and Development Command; the Communications-Electronics Command; the Soldier and Biological Chemical Command; the Naval Sea Systems Command Centers; the Naval Research Laboratory; the Office of Naval Research; and the Air Force Research Laboratory. (Senator Voinovich offered a similar provision as an amendment that was agreed to by voice vote by the Senate Governmental Affairs Committee during mark-up of S. 1166. According to Senator Voinovich's office, the amendment continued the authority of the reinvention laboratories to use various personnel flexibilities that DOD has found to be successful. The NSPS provisions might reduce these personnel flexibilities at the laboratories if they were to be included in NSPS said his office. In an article on the Governmental Affairs Committee mark-up, *The Washington Post* quoted a DOD official who said that the provision "while designed to protect existing flexibilities at the labs, would prevent the Pentagon from increasing those flexibilities."¹⁹

Limitations Relating to Pay. Nothing in Section 9902 constitutes authority to modify the pay of any employee who serves in an Executive Schedule position. Except for this provision, the total amount of allowances, differentials, bonuses, awards, or other similar cash payments paid under Title 5 in a calendar year to any employee who is paid under 5 U.S.C. §5376 (senior-level pay) or 5383 (Senior Executive Service pay) or under Title 10 or other comparable pay authority established for DOD senior executives or equivalent employees may not exceed the total annual compensation payable to the Vice President (\$203,000).

The law provides that to the maximum extent practicable, the rates of compensation for civilian DOD employees would be adjusted at the same rate, and in the same proportion, as are rates of compensation for members of the uniformed services.

¹⁹ Stephen Barr, "Senate Committee Backs Plan for Overhaul of Pentagon Pay, Rules," *The Washington Post*, June 18, 2003, p. B2.

To the maximum extent practicable, for FY2004 through FY2008, the overall amount allocated for compensation of the civilian employees of an organizational or functional unit of DOD that is included in the NSPS may not be less than the amount of civilian pay that would have been allocated for compensation of such employees for such fiscal year if they had not been converted to the NSPS. The amount will be based on, at a minimum, the number and mix of employees in such organizational or functional unit prior to the conversion of such employees to the NSPS; and adjusted for normal step increases and rates of promotion that would have been expected had such employees remained in their previous pay schedule. (S. 1166 included a similar provision.)

To the maximum extent practicable, the regulations implementing the NSPS will provide a formula for calculating the overall amount to be allocated for fiscal years after FY2008 for compensation of the civilian employees of an organizational or functional unit of DOD that is included in the NSPS. The formula will ensure that in the aggregate, employees are not disadvantaged in terms of the overall amount of pay available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions, and other changed circumstances that might impact pay levels. (S. 1166 included a similar provision.)

The Executive Schedule is the pay system for the heads of federal departments and agencies. As of January 2004, pay for the five levels of the Executive Schedule ranges from \$128,200 to \$175,700. This provision appears to authorize pay, for individual employees, which could exceed that of the department or agency heads. Under current law, OPM is required to certify that an agency has an acceptable performance management system in place before salaries for these employees could range up to the Vice President's salary. Since the proposals would not amend 5 U.S.C. §5307, it remains to be determined if OPM certification of the DOD policy will be required.

Under the new Section 9902(d) in P.L. 108-136, DOD is authorized to make changes in Title 5 Chapters 43 (Performance Appraisal) and 53 (Pay Rates and Systems) in establishing the new HRM system. The law does not provide any further detail on the design and operation of that new pay system.

Discussion of the Provisions. Several key chapters of Part III of Title 5 *United States Code* may be waived, modified, or otherwise affected as the new HRM system is developed. These are:

- Chapter 43 — Performance Appraisal
- Chapter 51 — Position Classification
- Chapter 53 — Pay Rates and Systems
- Chapter 71 — Labor Management and Employee Relations
- Chapter 75 — Adverse Actions
- Chapter 77 — Appeals

The Chapters 71, 75, and 77 changes are discussed below. Proposed regulations for Chapters 43 (Performance Appraisal), 51 (Position Classification), and 53 (Pay Rates and Systems) are tentatively scheduled to be published in the *Federal Register*

in January 2005. During testimony before the House Subcommittee on Civil Service and Agency Organization at its April 29, 2003 hearing on the proposed NSPS of the Defense Transformation for the 21st Century Act, however, David Chu discussed DOD's Best Practices Initiative. He referred Members of Congress to an April 2, 2003 *Federal Register* notice for additional details on the types of HRM flexibilities the department is implementing at its science and technology reinvention laboratories.²⁰ Information on these flexibilities follows.

On April 2, 2003, DOD published notice in the *Federal Register* of amendment of demonstration project plans covering personnel at eight science and technology reinvention laboratories.²¹ Such demonstration projects are currently ongoing at:

- Department of the Army — Army Research Laboratory; Aviation and Missile Research, Development, and Engineering Center; Communications-Electronics Command Research, Development, and Engineering Community; Engineer Research and Development Center; and Medical Research and Materiel Command;
- Department of the Navy — Naval Research Laboratory; Naval Sea Systems Warfare Centers; and
- Department of the Air Force — Air Force Research Laboratory

The *Federal Register* notice provides details about performance appraisal, position classification, and pay flexibilities that DOD is implementing at the reinvention laboratories. This information may provide some insight into what DOD is contemplating for these aspects of a new HRM system for the department. The following discusses each of these aspects of HRM *at the reinvention laboratories*.

Performance Appraisal. Currently, Title 5 *United States Code* provides that each executive branch agency must develop performance appraisal systems to periodically appraise the job performance of employees and to encourage employee participation in establishing performance standards. Appraisals are to be used to train, reward, reassign, promote, reduce in grade, retain, and remove employees. The OPM prescribes regulations on establishing standards for accurately evaluating job performance on the basis of objective criteria, as required by law.

Performance management includes both individual and group performance to improve organizational effectiveness in accomplishing an agency's mission and goals. Agencies are authorized to establish performance appraisal systems and may use one of eight patterns of summary levels of performance. These patterns range from a pass/fail system with two summary levels (unacceptable and fully successful) to a system with five summary levels (unacceptable, less than fully successful, fully successful, exceeds fully successful, and outstanding).

²⁰ Statement of David S. C. Chu, Under Secretary of Defense for Personnel and Readiness, April 29, 2003, p. 5. (unpublished)

²¹ U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Project; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142.

The reinvention laboratories will have their own pay-for-performance (PFP) evaluation system. Various features of the system are listed in **Table 3** in the Appendix.

Position Classification. At present, the technique of position classification is used to craft the federal government's civilian white-collar pay system, called the General Schedule (GS). Federal jobs are arranged into classes on the basis of the kind of work involved, its level of difficulty, responsibility, and the qualifications necessary to perform it. Rates of pay are then attached to each specific class. The pay structure is a job hierarchy. As an employee progresses through it, his or her salary increases. Positions at the GS-12 level, for instance, are said to demand more in terms of knowledge and skill, responsibility, and expected results than those at the GS-11 level, and therefore, have both a higher classification and rate of pay related to them.

The current system of classification standards established by OPM will be used by the reinvention laboratories to determine the occupational series and position titles for white-collar jobs. The OPM designations of such jobs as professional, administrative, technical, clerical, or other also will be used. References in the classification standards to the GS grades which are defined in statute (5 U.S.C. §5104) will not be used. Instead, descriptors for nonsupervisory and supervisory jobs will be prepared and used to compare individual positions for the purposes of determining the appropriate pay band levels. The nonsupervisory descriptors will derive from OPM's Primary Standard for the Factor Evaluation System, which provides for comparisons among factors necessary to perform a particular job.

Pay. The current pay system for federal civilian white-collar occupations at DOD (and government-wide) is the General Schedule. It is comprised of 15 grades with 10 steps in each grade. The pay grades are defined in statute at 5 U.S.C. §5104. An employee progresses through the steps of a pay grade after serving a specified amount of time²² at a particular level and having at least an acceptable level of performance.

At the reinvention laboratories DOD will replace the GS system with a pay banding system. Under the new system, pay bands would be associated with each of five career groups (CG) — CG 1, Scientific and Engineering Research; CG 2, Professional and Administrative Management; CG 3, Engineering, Scientific, and Medical Support; CG 4, Business and Administrative Support; and CG 5, College Cooperative Education Program. Descriptors of the pay band levels for nonsupervisory employees will state the characteristics of the positions at the top of the pay band level and will be established by the Under Secretary of Defense (Civilian Personnel Policy). **Table 1** in the Appendix shows the career groups and their associated pay band levels for nonsupervisory employees.

²² An employee must wait 52 calendar weeks to be advanced to steps 2, 3, and 4 of a pay grade; 104 calendar weeks to be advanced to steps 5, 6, and 7 of a pay grade; and 156 calendar weeks to be advanced to steps 8, 9, and 10 of a pay grade (5 U.S.C. §5335).

Career groups CG 1 through CG 4 will apply to supervisory employees. Descriptors of the pay band levels for supervisory employees will define limited supervision (supervisor A), first-level (supervisor B), second-level (supervisor C), and third-level managerial (supervisor D). A supervisory position's career group and pay band level are predicated upon the career group and pay band level of the subordinate workforce. A position must meet the narrative criteria in the descriptor and perform supervisory functions a significant portion of the time to be assigned a supervisory pay band level. The descriptors will be established by the Under Secretary of Defense (Civilian Personnel Policy). **Table 2** in the Appendix shows the career groups and their associated pay band levels for supervisory employees.

Proponents of pay banding emphasize that it increases the discretion of managers to set and adjust pay rates for individual employees. Skeptics who express concern about pay banding emphasize the need for strong internal controls to prevent escalating salary costs at the top levels of the pay bands.

According to DOD, blue-collar workers under the Federal Wage System can be covered by the NSPS. Currently, a working group is looking at this issue.

Provisions to Ensure Collaboration With Employee Representatives on National Security Personnel System. P.L. 108-136 adds a new section, 5 U.S.C. §9902(f), requiring the Secretary of Defense and the Director of OPM to provide a written description of the proposed personnel system or adjustments to such system to the labor organizations representing employees in the department. The bill uses the term “employee representatives” to describe these organizations. The employee representatives would be given at least 30 calendar days to review and make recommendations with respect to the proposal, unless extraordinary circumstances require earlier action. Such recommendations must be given full and fair consideration by the Secretary and the Director. Section 9902(f)(B)(i) requires the Secretary and the Director to notify Congress of those parts of the proposal for which recommendations were made, but not accepted.

Section 9902(f)(B)(ii) requires the Secretary and the Director to meet and confer with the employee representatives for not less than 30 calendar days to attempt to reach agreement on whether and how to proceed with those parts of the proposal for which recommendations were made, but not accepted. At the Secretary's option, or if requested by a majority of the employee representatives participating, the Federal Mediation and Conciliation Service may assist with the discussions. After 30 calendar days following notification and consultation, the Secretary may implement any or all of the disputed parts of the proposal if it were determined that further consultation and mediation were unlikely to produce agreement. However, such implementation may occur only after 30 days following notice to Congress of the decision to implement the part or parts involved. Implementation may occur immediately for those parts of the proposal that did not generate recommendations from the employee representatives, and where the Secretary and the Director accepted the recommendations of the employee representatives. The Secretary may, at his discretion, engage in any and all of the collaboration activities at an organizational level above the level of exclusive recognition.

If a proposal were implemented, the Secretary and the Director must develop a method for employee representatives to participate in any further planning or development which might become necessary. In addition, employee representatives must be given adequate access to information to make participation productive.

Provisions Regarding National Level Bargaining. A new section, 5 U.S.C. §9902(g)(1), of P.L. 108-136 allows any personnel system implemented or modified under Section 9902(f) and the new Chapter 99 established by the law to include employees from any bargaining unit with respect to which a labor organization has been accorded exclusive recognition. (A labor organization is described as having been accorded “exclusive recognition” when an election has occurred (with the labor organization receiving support from a majority of employees) and the results have been certified by the National Labor Relations Board or the Federal Labor Relations Authority.) For any of these bargaining units, the Secretary is permitted to bargain at an organizational level above the level of exclusive recognition. The decision to bargain at a level above the level of exclusive recognition is not subject to review or to dispute resolution procedures outside the department.

Any bargaining conducted at a level above the level of exclusive recognition is binding on all subordinate bargaining units and on the department and its subcomponents; supersedes all other collective bargaining agreements, except as otherwise determined by the Secretary; is not subject to further negotiations for any purpose, except as provided for by the Secretary; and is subject to review by an independent third party only to the extent permitted by the act.

Because organizational bargaining would likely focus on the larger issues affecting all employees, other topics may not be considered, including concerns that are significant only to a particular bargaining unit. Proponents of organizational bargaining, however, contend that such bargaining is more expeditious.

Provisions to Ensure Collaboration With Employee Representatives on Development of Labor Relations System. Section 9902(d)(2) prevents the new personnel system from waiving the application of Chapter 71 of the *United States Code*. Chapter 71 sets forth the labor-management relations structure for the federal government. At the same time, however, Section 9902(m)(1) authorizes the Secretary and the Director to establish and from time to time adjust a seemingly tailored labor relations system for the department. Section 9902(m)(1) indicates that such a system would “address the unique role that the Department’s civilian workforce plays in supporting the Department’s national security mission.”

To ensure that there is collaboration between the Secretary, the Director, and employee representatives, the Secretary is required to implement a process similar to the one defined for the creation of the NSPS. The Secretary and the Director are required to give employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system. Representatives must be given at least 30 calendar days to review the proposal for the system and make recommendations with respect to the proposal, unless extraordinary circumstances require earlier action. Recommendations must be given full and fair consideration.

Section 9902(m)(3)(B)(i) requires the Secretary and the Director to meet and confer with the employee representatives for not less than 30 calendar days to attempt to reach agreement on whether and how to proceed with those parts of the proposal for which recommendations were made, but not accepted. At the Secretary's option, or if requested by a majority of the employee representatives participating, the Federal Mediation and Conciliation Service may assist with the discussions. After 30 calendar days following consultation and mediation, the Secretary may implement any or all of the disputed parts of the proposal if it was determined that further consultation and mediation were unlikely to produce agreement. However, such implementation may occur only after 30 days following notice to Congress of the decision to implement the part or parts involved. Implementation may occur immediately for those parts of the proposal that do not generate recommendations from the employee representatives, and where the Secretary and the Director accepted the recommendations of the employee representatives.

The process for collaboration with the employee representatives must begin no later than 60 calendar days after the date of enactment. Section 9902(m)(4) authorizes the Secretary to engage in any and all of the collaboration activities at an organizational level above the level of exclusive recognition.

The labor relations system developed or adjusted under Section 9902(m) must provide for the independent third party review of decisions and for determining which decisions could be reviewed, who would conduct the review, and the standards to be used during the review. Unless extended or otherwise provided for in law, the authority to establish, implement, and adjust the labor relations system expires six years after the date of enactment. At that time, the provisions of chapter 71 will apply.

Implementation. On February 6, 2004, DOD presented a "concepts" paper that identified various proposed concepts for the NSPS labor relations system. Among the concepts was a proposal to establish a Defense Labor Relations Board to resolve labor-management disputes, a proposal to exclude certain categories of employees from bargaining units, and a proposal to restrict the consultation process in all cases to no more than 60 calendar days.²³ Labor organizations, including the American Federation of Government Employees, AFL-CIO, strongly opposed the concepts paper.²⁴ A March 9, 2004 letter from Senators Daniel Akaka, Richard Durbin, Carl Levin, and Joseph Lieberman and Representatives Danny Davis, Ike Skelton, and Henry Waxman to the Secretary of Defense, Donald Rumsfeld, "strongly urge[d] the department to withdraw this proposal immediately and submit a new proposal that is consistent with the intent of Congress." The letter stated that "[t]he DOD proposal effectively eliminates collective bargaining by providing only perfunctory 'consultation' followed by unilateral implementation" and stated that

²³ See Dept. of Defense, NSPS Labor Relations Outline (Feb. 6, 2004), available at [http://www.cpms.osd.mil.nsps/pdf/NSPS_LRS_DOD.pdf].

²⁴ See "Important New Developments in DOD's Plans to Revise Its Labor Relations, Appeals, Performance Management and Pay Systems," at [http://www.afge.org/Index.cfm?Page=Home&File=2004_04_02.htm].

“[t]his is not good-faith collective bargaining.”²⁵ In apparent response to the opposition, DOD appears to be working on a new labor relations system.²⁶

Provisions Relating to Appellate Procedures.²⁷ The new section, 5 U.S.C. §9902(h), of P.L. 108-136 (1) (A) authorizes the Secretary of Defense to establish an appeals process that must provide employees of DOD organizational and functional units that are included in the NSPS fair treatment in any appeals that they bring in decisions relating to their employment; and (B) mandates that the Secretary in prescribing regulations for that appeals process (i) ensure that these employees are afforded due process protections; and (ii) toward that end, be required to consult with the Merit Systems Protection Board (MSPB) before issuing such regulations. (2) Regulations implementing the appeals process may establish legal standards and procedures for personnel actions, including standards for applicable relief, to be taken for employee misconduct or performance that fails to meet expectations. These standards must be consistent with the public employment principles of merit and fitness set forth in section 2301 of Title 5 of the *United States Code*. (3) Legal standards and precedents applied before the effective date of the new section 9902 of Title 5 by the MSPB and the courts under Chapters 43 (Performance Appraisal), 75 (Adverse Actions) and 77 (Appeals) of Title 5 must apply to DOD employees included in the NSPS, unless these standards and precedents are inconsistent with standards established in section 9902.

(4) An employee who (A) is removed, suspended for more than 14 days, furloughed for 30 days or less, reduced in pay, or reduced in pay band (or comparable reduction) by a final decision under the appeals process established under paragraph 1; (B) is not serving a probationary period under regulations established under paragraph (2); and (C) is otherwise eligible to appeal a performance-based or adverse action under Chapters 43 or 75, as applicable, to the MSPB has the right to petition the full MSPB for a review of the record of that decision pursuant to regulations established under paragraph (2). The board is authorized to dismiss any petition that, in the board’s view, does not raise substantial questions of fact or law. No personnel action may be stayed and no interim relief may be granted during the pendency of the board’s review unless specifically ordered by the board.

(5) The board is authorized to order corrective action as it considers appropriate only if it determines that the department’s decision was (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) obtained without procedures required by law, rule, or regulation having been followed; or (C) unsupported by substantial evidence. (6) An employee who is adversely affected by a final order or decision of the MSPB may obtain judicial review of the order or decision as provided in section 7703. The Secretary of Defense, after notifying the

²⁵ David McGlinchey, “Scrap the System,” Mar. 11, 2004. Available on the Internet at [<http://www.govexec.com>], visited Apr. 27, 2004.

²⁶ *Id.* See also Letter from David S.C. Chu, Under Secretary of Defense for Personnel & Readiness, and Gordon R. England, Secretary of the Navy, to DOD Civilian Employees (April 1, 2004), at [<http://www.cpms.osd.mil/nsps>].

²⁷ Almost all of the provisions on appellate procedures derive from S. 1166, with a few changes.

OPM Director, may obtain judicial review of any board final order or decision under the same terms and conditions as provided an employee.

(7) Nothing in subsection (h) of the new section 9902 of Title 5 of the *United States Code* should be construed to authorize the waiving of any provision of law, including an appeals provision providing a right or remedy under section 2302(b)(1), (8), or (9) of Title 5 that is not otherwise waivable under subsection (a) of the new section 9902. Section 2302(b)(1) makes it a prohibited personnel practice to discriminate for or against any employee on such bases as race, color, religion, sex, or national origin, age, handicapping conditions under relevant statutes, or marital status or political status under any law, rule, or regulation. Section 2302(b)(8) prohibits personnel actions in reprisal for whistleblowing. Section 2302(b)(9) prohibits personnel actions in reprisal for such things as exercising any right of appeal, complaint, or grievance; cooperating with or disclosing information to the Inspector General or Special Counsel; or refusing to obey an order that would require an individual to violate a law.

(8) The right of an employee to petition the final decision of DOD on an action covered by paragraph (4) of section 9902(h) to MSPB, and the right of the board to review such action or to order corrective action pursuant to paragraph (5), is provisional for seven years after the date Chapter 99 is enacted, and becomes permanent unless Congress acts to revise such provisions.

Chapter 77 is one of the chapters of Title 5 that is subject to waiver or modification by the Secretary of Defense in establishing an HRM system for DOD. Section 7701 of Title 5 grants employees and applicants for employment a right to appeal to MSPB any action which is appealable to the board under any law, rule, or regulation. An appellant has a right to a hearing at which a transcript will be kept and to be represented by an attorney or other representative.

An agency decision is sustained by the board only if it is supported by substantial evidence in the case of an action based on unacceptable performance described in 5 U.S.C. §4303 or a removal from the Senior Executive Service for failing to be recertified or if it is supported by a preponderance of evidence in any other case. Notwithstanding these standards, an agency's decision may not be sustained, if the employee or applicant for employment — (A) shows harmful error in the application of the agency's procedures in arriving at its decision; (B) shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. §2302; or (C) shows that the decision was not in accordance with law.

Section 7702 of Title 5 prescribes special procedures for any case in which an employee or applicant who has been affected by an action appeals to the board and alleges that a basis for the action was discrimination. The board first decides both the appealable action and the issue of discrimination within 120 days after it is filed. In any action before an agency which involves an appealable action and discrimination, the agency must resolve the matter within 120 days. An agency decision is judicially reviewable unless the employee appeals the matter to the board.

Any decision of the board in an appealable action where discrimination has been alleged is judicially reviewable as of the date the board issues its decision if an

employee or the applicant does not file a petition for consideration by the Equal Employment Opportunity Commission. Within 30 days after a petition is filed, the commission must decide whether to consider the board's decision. If the commission decides to consider such a decision, within 60 days it must concur in the board's decision or issue a written decision which differs from it. Within 30 days after receiving a commission decision that differs from the board's initial decision, the board must consider the commission's decision and either concur in whole in it or reaffirm its initial decision or reaffirm its initial decision with appropriate revisions. A board decision to concur and adopt in whole a commission decision is judicially reviewable.

If the board reaffirms its initial decision or reaffirms it with revisions that it determines appropriate, the matter must immediately be certified to a special panel comprised of one individual appointed by the President, one board member, and one commission member. Within 45 days after certification, the special panel is required to review the record, decide the disputed issues on the basis of the record, and issue a final decision, which is judicially reviewable. The special panel must refer its decision to the board, which is required to order the agency involved to take any appropriate action to carry out the panel's decision. The panel must permit the employee or applicant who brought the complaint and the agency to appear before it to present oral arguments and to present written arguments.

If prescribed time periods for action by an agency, board, or commission are not met, an employee is entitled to file a civil action in district court under some antidiscrimination statutes. If an agency does not resolve a matter appealable to the board where discrimination has been alleged within 120 days, the employee may appeal the matter to the board. Nothing in section 7702 of Title 5 "Actions Involving Discrimination" can be construed to affect the right to trial de novo in district court under named antidiscrimination statutes after a judicially reviewable action.

Under Section 7703 of Title 5, any employee or applicant who is adversely affected or aggrieved by a final order or decision of the MSPB may obtain judicial review of the order or decision. Except in cases involving allegations of discrimination, a petition to review a final board order or decision must be filed with the United States Court of Appeals for the Federal Circuit within 60 days after the petitioner received notice of the final order or decision. Cases involving discrimination must be filed in district court under procedures prescribed in antidiscrimination statutes within 30 days after the individual filing the case receives notice of a judicially reviewable action. In any case filed with the Federal Circuit Court of Appeals, the court is required to hold unlawful and set aside any agency action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulations having been followed; or (3) unsupported by substantial evidence, except that in the case of discrimination brought under named antidiscrimination statutes, an employee or applicant has a right to have the facts heard in a trial de novo by a reviewing court.

Provisions Related to Separation and Retirement Incentives. Under current law, a federal agency that is restructuring or downsizing can, with the approval of OPM, offer voluntary early retirement to employees in specific

occupational groups, organizational units, or geographic locations who are age 50 or older and have at least 20 years of service, or who are any age and have at least 25 years of service. Also with the approval of OPM, a federal agency may offer voluntary separation incentive payments of up to \$25,000 to employees who retire or resign. The full amount must be repaid if individual is re-employed by the federal government within five years.

P.L. 108-136 creates a new Section 9902(i) of Title 5 that authorizes the Secretary of Defense, without review by OPM, to establish a program within DOD under which employees may be eligible for early retirement, offered separation incentive pay to separate from service voluntarily, or both. The authority may be used to reduce the number of personnel employed by DOD or to restructure the workforce to meet mission objectives without reducing the overall number of personnel. It is in addition to, and notwithstanding, any other authorities established by law or regulation for such programs.

The Secretary may not authorize the payment of voluntary separation incentive pay (VSIP) to more than 25,000 employees in any fiscal year, except that employees who receive VSIP as a result of a closure or realignment of a military installation under the Defense Base Closure and Realignment Act of 1990 (Title XXIX of P.L. 101-510) will not be included in that number. The Secretary must prepare a report each fiscal year setting forth the number of employees who received such pay as a result of a closure or realignment of a military base and submit it to the Senate Committees on Armed Services and Governmental Affairs and the House Committees on Armed Services and Government Reform.

“Employee” means a DOD employee serving under an appointment without time limitation. The term does not include (A) a reemployed annuitant under 5 U.S.C. Subchapter III, Chapters 83 or 84, or another retirement system for federal employees; (B) an employee having a disability on the basis of which he or she is or would be eligible for disability retirement; or (C) for purposes of eligibility for separation incentives, an employee who has received a decision notice of involuntary separation for misconduct or unacceptable performance.

An employee who is at least 50 years of age and has completed 20 years of service, or has at least 25 years of service, could, pursuant to regulations promulgated under this section, apply and be retired from DOD and receive benefits in accordance with Chapters 83 or 84 if he or she has been employed continuously within DOD for more than 30 days before the date on which the determination to conduct a reduction or restructuring within one or more DOD components is approved.

Separation pay will be paid in a lump sum or in installments and will be equal to the lesser of (i) an amount equal to the amount the employee would be entitled to receive under 5 U.S.C. 5595(c), if the employee were entitled to payment; or (ii) \$25,000. Separation pay is not a basis for payment, and is not included in the computation, of any other type of government benefit. It will not be taken into account to determine the amount of any severance pay to which an individual could be entitled under 5 U.S.C. 5595, based on any other separation. If paid in installments, separation pay will cease to be paid upon the recipient’s acceptance of federal employment, or commencement of work under a personal services contract.

An employee who receives separation pay may not be reemployed by DOD for a 12-month period beginning on the effective date of the employee's separation, unless this prohibition is waived by the Secretary on a case-by-case basis. An employee who receives separation pay on the basis of a separation occurring on or after the enactment date of the Federal Workforce Restructuring Act of 1994 (P.L. 103-236) and accepts employment with the federal government, or who commences work through a personal services contract with the United States within five years after the date of the separation on which payment of the separation pay is based, would be required to repay the entire amount of the separation pay to DOD. If the employment is with an executive agency other than DOD, the OPM Director could, at the request of the agency head, waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position. If the employment is within DOD, the Secretary could waive the repayment if the individual involved is the only qualified applicant available for the position. If the employment is with an entity in the legislative branch, or with the judicial branch, the head of the entity or the appointing official, or the Director of the Administrative Office of the U.S. Courts, could waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

Under this program, early retirement and separation pay may be offered only pursuant to regulations established by the Secretary, subject to such limitations or conditions as the Secretary may require.

Implementation. The Deputy Under Secretary of Defense for Civilian Personnel Policy, Ginger Groeber, issued a memorandum to implement the voluntary separation incentive payments (buyouts) and the voluntary early retirement provisions on December 30, 2004. Buyouts are limited to 25,000 employees annually. For FY2004, the Army, Navy, Air Force, and Defense agencies were allocated 7,722; 7,135; 5,873; and 4,270 buyouts, respectively. Voluntary early retirements are not limited. To be eligible for a buyout, an individual must have been employed by DOD for a continuous period of at least 12 months. According to the DOD guidance, members of the Senior Executive Service and employees above GS-15 are not eligible for buyouts or early retirement unless the Principal Deputy Under Secretary of Defense for Personnel and Readiness approves the action to avoid a reduction in force or to restructure the workforce.²⁸

Provisions Relating to Reemployment. Under current law, a retired federal employee who is re-employed by the federal government may not receive a federal retirement annuity and a federal salary simultaneously. Sections 8344 (Civil Service Retirement System (CSRS)) and 8468 (Federal Employees' Retirement System (FERS)) of Title 5 provide that if a retired federal employee who is receiving an annuity from the Civil Service Retirement and Disability Fund is re-employed by a federal agency, an amount equal to the annuity shall be deducted from his or her

²⁸ U.S. Department of Defense, Office of the Under Secretary of Defense for Personnel and Readiness, "National Security Personnel System — Voluntary Separation Incentive Pay (VSIP) and Voluntary Early Retirement Authority (VERA) Policy," Dec. 30, 2003.

pay. If re-employment lasts more than one year, the individual will be eligible for a supplemental annuity for the period of re-employment when he or she retires.

P.L. 108-136 creates a new Section 9902(j) of Title 5 that provides that if a retired federal employee who is receiving an annuity from the Civil Service Retirement and Disability Fund were to be employed by DOD, his or her annuity would continue. The employee would not accrue additional credit under either CSRS or FERS during this period of re-employment.

Implementation. On March 18, 2004, the Under Secretary of Defense for Personnel and Readiness, David Chu, issued a memorandum to implement the reemployment provisions. According to Mr. Chu, “This critical hiring flexibility will help address the challenges of ‘retirement-driven talent drain’ as our current generation of dedicated civil servants become eligible to retire.” Under the DOD guidance, annuitants may be reemployed:

In positions that are hard-to-fill as evidenced by historically high turnover, a severe shortage of candidates or other significant recruiting difficulty; or positions that are critical to the accomplishment of the organization’s mission; or to complete a specific project or initiative;

[If they] have unique or specialized skills, or unusual qualifications not generally available; or

For not more than 2087 hours (e.g., one year full time, or two years part time) to mentor less experienced employees and/or to provide continuity during critical organizational transitions. Extensions beyond 2087 hours are not authorized.²⁹

The next-level manager or supervisor must certify in writing that one or more of the above conditions exists if a retiree seeks to return to the same or a substantially similar position as the one from which he or she retired. If less than 90 days has elapsed between the retirement and the reemployment, the certification must indicate that retention options were considered and offered to the employee before retirement. The DOD guidance covers annuitants who are rehired after November 23, 2004. The Deputy Under Secretary of Defense for Civilian Personnel Policy will monitor the use of the reemployment authority and may establish reporting requirements.

Additional Provisions Relating to Personnel Management. Notwithstanding Section 9902(d), the Secretary of Defense, in establishing and implementing the NSPS, is not limited by any provision of Title 5 or any rule or regulation prescribed under Title 5 in establishing and implementing regulations relating to —

- (A) the methods of establishing qualification requirements for, recruitment for, and appointments to positions;
- (B) the methods of assigning, reassigning, detailing, transferring, or promoting employees; and

²⁹ U.S. Department of Defense, Under Secretary of Defense for Personnel and Readiness, “Employment of Annuitants,” Mar. 18, 2004.

(C) the methods of reducing overall agency staff and grade levels, except that performance, veterans' preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate must be considered in decisions to realign or reorganize the Department's workforce.

In implementing this subsection, the Secretary must comply with 5 U.S.C. §2302(b)(11), regarding veterans' preference requirements.

Phase-In. The Secretary may apply the NSPS to an organizational or functional unit that includes up to 300,000 civilian DOD employees and to an organizational or functional unit that includes more than 300,000 civilian DOD employees, if the Secretary determines that the department has in place a performance management system that meets the criteria specified. (S. 1166 included a similar phase-in provision.)

Section 9903. Attracting Highly Qualified Experts³⁰

The new Section 9903 authorizes the Secretary of Defense to carry out a program in order to attract highly qualified experts in needed occupations, as determined by him. Under the program, the Secretary may appoint personnel from outside the civil service and uniformed services (as such terms are defined in 5 U.S.C. §2101) to positions in DOD without regard to any provision of Title 5 governing the appointment of employees to positions in DOD. The Secretary also may prescribe the rates of basic pay for positions to which employees are appointed at rates not in excess of the maximum rate of basic pay authorized for senior-level positions under 5 U.S.C. §5376 (Executive Schedule (EX) Level IV, \$136,900 as of January 2004), as increased by locality-based comparability payments (total cannot exceed EX level III, \$145,600 as of January 2004), notwithstanding any provision of Title 5 governing the rates of pay or classification of employees in the executive branch. The Secretary may pay any employee appointed under this section payments in addition to basic pay within the limits applicable to the employee as discussed below.

The service of an employee under an appointment made pursuant to this section may not exceed five years. The Secretary may, however, in the case of a particular employee, extend the period to which service is limited by up to one additional year if he determines that such action is necessary to promote DOD's national security missions.

The total amount of the additional payments paid to an employee under this section for any 12-month period may not exceed the lesser of \$50,000 in FY2004, or an amount equal to 50% of the employee's annual rate of basic pay. The \$50,000 may be adjusted annually thereafter by the Secretary, with a percentage increase equal to one-half of one percentage points less than the percentage by which the Employment Cost Index (ECI), published quarterly by the Bureau of Labor Statistics, for the base quarter of the year before the preceding calendar year exceeds the ECI for the base quarter of the second year before the preceding calendar year. "Base quarter" has the same meaning given at 5 U.S.C. §5302(3).

³⁰ 117 Stat. 1632-1633.

An employee appointed under this section is not eligible for any bonus, monetary award, or other monetary incentive for service except for payments authorized under this section. Notwithstanding any other provision of this subsection or of 5 U.S.C. §5307, no additional payments may be paid to an employee in any calendar year, if, or to the extent that, the employee's total annual compensation will exceed the maximum amount of total annual compensation payable to the Vice President (\$203,000).

The number of highly qualified experts appointed and retained by the Secretary may not exceed 2,500 at any time. (Under S. 1166, the limitation would have been 300.)

In the event that the Secretary terminates this program, the following will occur. In the case of an employee who on the day before the termination of the program is serving in a position pursuant to an appointment under this section, the termination of the program does not affect the employee's employment in that position before the expiration of the lesser of the period for which the employee was appointed or the period to which the employee's service is limited, including any extension made under this section before the termination of the program. The rate of basic pay prescribed for the position may not be reduced as long as the employee continues to serve in the position without a break in service.

The committee report which accompanied H.R. 1836 stated that "[t]he authority [in this provision] is consistent with that now available to the Defense Advanced Research Projects Agency and Military Departments for hiring scientists and engineers."³¹

Implementation. DOD issued guidance to implement the provision on highly qualified experts on February 27, 2004. The guidance identifies such an expert as:

an individual possessing uncommon, special knowledges or skills in a particular occupational field beyond the usual range of expertise, who is regarded by others as an authority or practitioner of unusual competence and skill. The expert knowledge or skills are generally not available within the Department and are needed to satisfy an emerging and relatively short-term, non-permanent requirement.³²

The hiring authority cannot be used to provide temporary employment in anticipation of permanent employment, to provide services that are readily available with DOD or another federal agency, to perform continuing DOD functions, to bypass or undermine personnel ceilings or pay limitations, to aid in influencing or

³¹ H.Rept. 108-116, Part 1, p. 33. This provision in H.R. 1588, as passed by the House of Representatives, was Sec. 102(a) of H.R. 1836, as reported.

³² U.S. Department of Defense, Under Secretary of Defense for Personnel and Readiness, Memorandum for Secretaries of the Military Departments, "Employment of Highly Qualified Experts," Feb. 27, 2004.

enacting legislation, to give former federal employees preferential treatment, to do work performed by regular employees, or to fill in during staff shortages.³³

Basic pay for experts would be determined according to such factors as:

- Labor market conditions;
- Type of position;
- Location of position;
- Work schedule;
- Level of independence in establishing work objectives;
- Working conditions;
- Organizational needs;
- Personal qualifications;
- Type of degree;
- Personal recommendations;
- Experience (recency, relevance);
- Budget considerations;
- Organizational equity/pay considerations; and
- Mission impact of work assignments.³⁴

An expert's pay may be increased because of an "exceptional level of accomplishment related to projects, programs, or tasks that contribute to the Department or Component strategic mission."³⁵

The Defense Civilian Personnel Data System will be used to record the employment of highly qualified experts. Written documentation must be maintained and must include the criteria for the appointment and the factors and criteria used to set and increase pay and to provide additional payments. The records must be retained for three years after an employee is terminated.³⁶

Section 9904. Special Pay and Benefits for Certain Employees Outside the United States³⁷

The new Section 9904 of P.L. 108-136 authorizes the Secretary of Defense to provide allowances and benefits to certain civilian DOD employees assigned to activities outside the United States, as determined by the Secretary to be in support of DOD activities abroad hazardous to life or health or so specialized because of security requirements as to be clearly distinguishable from normal government employment. Such allowances and benefits will be comparable to those provided by the Secretary of State to members of the Foreign Service under Chapter 9 of Title I of the Foreign Service Act of 1980 or any other provision of law; or comparable to

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ 117 Stat. 1633.

those provided by the Director of Central Intelligence to personnel of the Central Intelligence Agency (CIA). Special retirement accrual benefits and disability that are in the same manner provided for by the CIA Retirement Act and in Section 18 of the CIA Act of 1949 also will be provided.

Impact on Department of Defense Civilian Personnel

Section 1101(b) of P.L. 108-136 provides that any exercise of authority under the proposed new Chapter 99, including under any system established under that chapter, must be in conformance with the requirements of this subsection. No other provision of this act or of any amendment made by this act may be construed or applied in a manner so as to limit, supersede, or otherwise affect the provisions of this section, except to the extent that it does so by specific reference to this section.

Department of Defense Civilian Personnel Generally — Title XI, Subtitle B, of P.L. 108-136

Military Leave for Mobilized Federal Civilian Employees³⁸

Section 1113 of P.L. 108-136 amends 5 U.S.C. §6323 to authorize military leave for an individual who performs full-time military service as a result of a call or order to active duty in support of a contingency operation.³⁹ Under military leave, the individual receives leave without loss of, or reduction in, pay, leave to which he or she is otherwise entitled, credit for time or service, or performance or efficiency rating, for up to 22 workdays in a calendar year. The provision applies to military service performed on or after the act's enactment date, November 24, 2003.

The committee report accompanying H.R. 1836 explained the need for the provision:

This section would help Federal civilian employees whose military pay is less than their Federal civilian salary “transition” to military service by allowing them to receive 22 additional workdays of military leave when mobilized. Such leave would help alleviate the difference in pay for the first month of service by enabling them to receive the difference between their Federal civilian pay and their military pay. Current law only entitles Reserve component members to the additional military leave.⁴⁰

³⁸ 117 Stat. 1635.

³⁹ Contingency operation is defined as a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. It also could be a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

⁴⁰ H.Rept. 108-116, part 1, p. 34. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 203 of H.R. 1836, as reported.

Extension of Authority for Experimental Personnel Program for Scientific and Technical Personnel⁴¹

Section 1116 amends Subsection (e)(1) of Section 1101 of the Strom Thurmond National Defense Authorization Act for FY1999 (P.L. 105-261; 112 Stat. 2139; 5 U.S.C. §3104 note) to extend the experimental personnel program for scientific and technical personnel until September 30, 2008 (the annual report will be required in 2009).

Subtitle B of Title XI of P.L. 108-136 also includes provisions on an automated personnel management program, the demonstration project relating to certain acquisition personnel management, restoration of annual leave to certain DOD employees affected by base closings, and employment of certain civilian faculty members at a Defense institution, which are beyond the purview of this report.

Department of Defense Civilian Personnel Generally — Title XI, Subtitle C, of P.L. 108-136

The provisions at Subtitle C of Title XI of P.L. 108-136 apply to federal civilian employees government-wide.

Modification of the Overtime Pay Cap⁴²

Section 1121 amends 5 U.S.C. §5542(a)(2) which covers the computation of overtime rates of pay. It provides that such an employee will receive overtime at a rate which will be the greater of one and one-half times the hourly rate for GS-10, step 1, or his or her hourly rate of basic pay. The law previously in effect provided that an employee whose basic pay rate exceeded GS-10, step 1 (including any locality pay or special pay rate) received overtime at a rate of one and one-half times the hourly rate for GS-10, step 1 (150% of GS-10, step 1).

For employees whose regular pay is greater than the 150% of GS-10, step 1 cap, the law previously in effect resulted in overtime pay at a rate less than their regular hourly rate. P.L. 108-136 addresses this circumstance and the situation in which managers and supervisors, whose overtime rate is capped at 150% of GS-10, step 1, receive less compensation for overtime work than employees who are subordinate to them. The Congressional Budget Office (CBO) determined that the provision would affect employees above GS-12, step 5.⁴³

Implementation. OPM will revise its regulations to reflect the new policy, but agencies were advised to ensure that proper overtime payments were being made as of November 24, 2003, the law's enactment date.

⁴¹ 117 Stat. 1636.

⁴² 117 Stat. 1636.

⁴³ H.Rept. 108-116, part 1, p. 54.

Common Occupational and Health Standards for Differential Payments as a Consequence of Exposure to Asbestos⁴⁴

Section 1122 amends 5 U.S.C. §5343(c)(4), which authorizes blue-collar employees to receive pay differentials for unusually severe working conditions or unusually severe hazards, and 5 U.S.C. §5545(d), which authorizes pay differentials for unusual physical hardship or hazard for General Schedule (GS) employees. The amendment provides that pay differentials for any hardship or hazard related to asbestos will be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. Subject to any vested constitutional property rights, any administrative or judicial determination after the act's enactment date concerning backpay for a differential under 5 U.S.C. §5343(c)(4) or 5545(d) will be based on occupational safety and health standards under the Occupational Safety and Health Act of 1970.

The Congressional Budget Office (CBO) explained the provision in its cost estimate for H.R. 1836. According to CBO, the provision provides that

federal wage-grade employees would be subject to the same standards as general schedule employees when determining eligibility for environmental differential pay (EDF) due to exposure to asbestos. Under current law, general schedule employees are entitled to 8 percent hazard differential pay [HDP] if they are exposed to asbestos that exceeds the permissible exposure limits established by OSHA. The current EDF standard for wage-grade employees entitles them to the same 8 percent of pay but does not set an objective measure for determining the level of asbestos exposure necessary to qualify for EDF. In several instances when wage-grade employees have sought back pay for EDF, arbitrators have found in favor of the employees when asbestos levels were below those consistent with OSHA standards.⁴⁵

Implementation. According to OPM, administrative or judicial determinations concerning EDF or HDP for asbestos exposure must be based on the OSHA permissible exposure limits for asbestos as of November 24, 2003. OPM regulations on HDP for GS employees include this requirement. The personnel agency will update the EDF regulations for wage employees to include the requirement.

Increase in Annual Student Loan Repayment Authority⁴⁶

Section 1123 amends 5 U.S.C. §5379(b)(2)(A) to provide that student loan repayments to an employee may not exceed \$10,000 in any calendar year, replacing

⁴⁴ 117 Stat. 1636-1637.

⁴⁵ H.Rept. 108-116, part 1, pp. 53-54. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 204 of H.R. 1836, as reported. The complete Congressional Budget Office cost estimate is at pp. 51-58 of H.Rept. 108-116, part 1.

⁴⁶ 117 Stat. 1637.

the up to \$6,000 per calendar year that the current law allows. The provision became effective on January 1, 2004.

Given the increasingly larger burdens of debt that graduates are assuming, this provision could provide additional flexibility to managers and agencies wanting to offer student loan repayments to their employees. Federal agencies have said that they would need additional appropriations to fund such incentives as student loan repayments.

Implementation. OPM issued regulations to implement the program on April 20, 2004.⁴⁷

Authorization for Cabinet Secretaries, Secretaries of Military Departments, and Heads of Executive Agencies to be Paid on a Biweekly Basis⁴⁸

Section 1124 “allow[s] cabinet secretaries, secretaries of military departments and heads of executive agencies to be paid bi-weekly like most Federal employees. This proposal save[s] time and cost resources by relieving civilian pay and disbursing operations from having to utilize special manual procedures to accommodate these personnel.”⁴⁹

Section 5504 of Title 5 is modified by consolidating the definition of employee for the purpose of the section so that the same groups are covered by the requirement for a bi-weekly pay period and by the methods for converting annual rates of pay into hourly, daily, weekly, or biweekly rates. Currently “employee” is defined under each of these provisions and both exclude groups of people excluded from the definitions of employees in 5 U.S.C. §5541 on premium pay. P.L. 108-136 continues that exclusion, but adds a provision that an agency could elect to have excluded employees be paid on the bi-weekly basis. It should be noted that under the current provisions, employees in the judicial branch are covered under the conversion language, but are not included in the language of this provision. It is not known if that omission was by intent or if the latitude for discretionary inclusion was assumed to apply to that class of employee.

Implementation. The provision became effective on the first day of the first applicable pay period beginning on or after November 24, 2003, which was November 30, 2003 for most officials and employees.

⁴⁷ U.S. Office of Personnel Management, “Repayment of Student Loans,” *Federal Register*, Apr. 20, 2004, vol. 69, no. 76, p. 21039.

⁴⁸ 117 Stat. 1637-1638.

⁴⁹ H.Rept. 108-116, part 1, p. 35. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 206 of H.R. 1836, as reported.

Senior Executive Service and Performance⁵⁰

Section 1125(a) effected changes to basic pay and locality pay for members of the Senior Executive Service (SES), and individuals in certain other positions. Regarding basic pay, this section replaced 5 U.S.C. §5382. The new language required the establishment of a range of rates of basic pay for the SES, subject to regulations prescribed by OPM.⁵¹ Each senior executive is to be paid at one of the rates within the range based on individual performance, contribution to the agency's performance, or both. Previously, Section 5382 required the establishment of at least five rates of basic pay; each senior executive was paid at one of the rates. Section 1125(a) also raised the cap on basic pay from level IV of the Executive Schedule (\$136,900 in 2004) to level III of the Executive Schedule (\$145,600). The cap on basic pay increased to level II of the Executive Schedule (\$158,100) for any agency whose performance appraisal system is certified as making meaningful distinctions based on relative performance. The pay range for agencies with a certified SES performance appraisal system is \$104,927 to \$158,100. For agencies without a certified system, the range is \$104,927 to \$145,600. Most members of the SES converted to the new pay range on January 11, 2004.

Section 1125(a) is similar to Section 1322 of P.L. 107-296, the Homeland Security Act,⁵² which established a similar mechanism — certification of a performance appraisal system — for allowing the cap on total compensation (which includes awards and bonuses) to move from level I of the Executive Schedule (\$175,700) to the Vice President's salary (\$203,000) for senior executives and individuals in certain other positions governmentwide. OPM has not yet released regulations or guidance for implementing Section 1322. Language in Section 1125(a) protects any senior executive who transfers from a certified agency to a noncertified agency by prohibiting a reduction in pay.

Instituting a pay band and shifting the cap on basic pay from level IV to level III might help to ease pay compression, at least temporarily, within the SES. A shift to level II would provide additional relief. Many believe this provision has the potential for interjecting more accountability into the SES. Others are concerned that in an effort to develop and apply a performance appraisal system that is based on meaningful distinctions, agencies might create and impose a forced distribution of performance ratings.

Section 1125(a) amended 5 U.S.C. §5304 so that the following positions are no longer be eligible for locality pay: positions in the SES; positions in the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) SES; and positions in a system equivalent to the SES, as determined by the President's Pay Agent. Considering the changes made to the caps on total pay and basic pay, which resulted in the establishment of caps at levels I, II, and III of the Executive Schedule,

⁵⁰ 117 Stat. 1638-1640.

⁵¹ An interim rule was issued in January 2004. See U.S. Office of Personnel Management, "Senior Executive Service Pay and Performance Awards," *Federal Register*, Jan. 13, 2004, vol. 69, no. 8, pp. 2048-2052.

⁵² 116 Stat. 2137; Nov. 25, 2002.

the elimination of locality pay might be viewed as a practical matter. However, senior executives employed by an agency whose performance appraisal system is not certified could be adversely affected by the loss of locality pay.

Under Section 1125(c), the amendments made by this section took effect on the first date of the first pay period that began on or after January 1, 2004 (which was January 11 for most senior executives).⁵³ Section 1125(c) also ensures that a senior executive's basic rate of pay will not be reduced, as a result of changes effected by Section 1125(a), during the first year after enactment. For the purpose of ensuring that an individual's rate of basic pay is not reduced, a senior executive's rate of basic pay will equal the rate of basic pay and the locality pay he or she was being paid on the date of enactment of this legislation. Section 1125(c) noted that any reference in law to a rate of basic pay above the minimum level and below the maximum level payable to senior executives will be considered a reference to the rate of pay for Executive Schedule level IV.⁵⁴

Post-Employment Restrictions⁵⁵

Section 1125(b) applies the post-employment conflict of interest provision commonly known as the one-year "cooling off" period (18 U.S.C. §207(c)(1)) to (in addition to those paid on the Executive Schedule) those not paid on the Executive Schedule but who are compensated at a rate of pay equal to, or greater than, 86.5% of the rate of basic pay for level II of the Executive Schedule (\$158,100 in 2004, so \$136,757), or, for two years after the enactment of this act, those persons who would have been covered by the restriction the day before the act was passed (those compensated at a base rate of pay equal to or greater than a level 5 for the SES. The provision amends 18 U.S.C. §207(c)(2)(A)(ii).⁵⁶

Design Elements of Pay-for-Performance Systems in Demonstration Projects⁵⁷

Section 1126 amends 5 U.S.C. Chapter 47 which covers the conduct of personnel research programs and demonstration projects. The provision specifies

⁵³ Sec. 1125(b) addresses post-employment restrictions generally, and is addressed in another section of this report.

⁵⁴ See U.S. Office of Personnel Management, Memorandum For Heads of Departments and Agencies, "New Performance-Based Pay System for the Senior Executive Service," Dec. 16, 2003; U.S. Office of Personnel Management, Memorandum For Heads of Executive Departments and Agencies, "Conversion to New SES Performance-Based Pay System," Jan. 9, 2004; and U.S. Office of Personnel Management, "Senior Executive Service Pay and Performance Awards," *Federal Register*, vol. 69, Jan. 13, 2004, pp. 2048-2052.

⁵⁵ 117 Stat. 1639-1640.

⁵⁶ See U.S. Office of Personnel Management, Memorandum For Heads of Executive Departments and Agencies, "Notification of Changes in Post-Employment Restrictions Coverage for Members of the Senior Executive Service (SES)," Jan. 6, 2004.

⁵⁷ 117 Stat. 1640.

certain elements that must be present in a demonstration project's pay-for-performance system. The eight elements are:

- adherence to merit system principles under 5 U.S.C. §2301;
- a fair, credible, and transparent employee performance appraisal system;
- a link between elements of the pay-for-performance system, the employee performance appraisal system, and the agency's strategic plan;
- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

These eight elements address longstanding concerns expressed by employees, their unions, and representatives about the pay-for-performance component of demonstration projects.

Federal Flexible Benefits Plan Administrative Costs⁵⁸

Section 1127 prohibits federal agencies that offer flexible spending accounts (FSAs) from imposing fees on employees to defray their administrative costs. It also requires agencies to forward to OPM (or an entity it designates) amounts to offset these costs. OPM is required to submit to the House Committee on Government Reform and the Senate Committee on Governmental Affairs, no later than March 31, 2004, reports on the administrative costs associated with the governmentwide FSA program for FY2003 and the projected administrative costs for each of the five fiscal years thereafter. At the end of each of the first three calendar years in which an agency offers FSAs, the agency will be required to submit a report to the Office of Management and Budget (OMB) on the employment tax savings from the accounts (i.e., the Social Security and Medicare taxes they otherwise would have had to pay), net of administrative fees paid.

Employees in most federal agencies were given an FSA option starting in July 2003. The new benefit allows employees to put pretax money aside for unreimbursed health care or dependent care expenses in exchange for receiving lower pay. (Section 5525 of Title 5 provides that agency heads may establish procedures under which employees are permitted to make allotments and assignments out of their pay for

⁵⁸ 117 Stat. 1640-1641.

such purposes as the agency head considers appropriate.) For example, employees might elect to reduce their pay by \$50 each pay period in exchange for having \$1,300 (i.e., \$50 x 26 pay periods in a year) placed in their health care FSA. When they incur unreimbursed health care expenses (e.g., copayments and deductibles, or dental expenditures not covered by insurance) they would be reimbursed from their account. FSA reimbursements are exempt from federal income and employment taxes as well as state income taxes; thus, employees electing to participate can save on taxes they otherwise would have incurred had they instead used take-home pay for the expenses. Information about the federal FSAs can be found at [<http://www.fsafeds.com>].

FSAs involve administrative costs, particularly for determining the eligibility of submitted claims. OPM, which has contracted with SHPS, Inc., to administer the FSAs, originally intended to have participating employees pay \$4 a month for their health care FSA and 1.5% annually of the amount set aside for their dependent care FSA. Shortly before the program started, OPM gave agencies the option of absorbing administrative expenses themselves, and most have done so. P.L. 108-136 requires participating agencies to pay the administrative costs and prohibits the government from charging fees to employees.

One argument for having employees pay FSA administrative costs is that they are the principal beneficiaries; if the government were to pay, the cost might be partially borne by employees without FSAs or by other programs or even taxpayers generally. However, imposing fees on employees could discourage participation. Few private sector or other employers impose FSA fees on participants; most pay for the administrative costs out of their employment tax savings.

Implementation. As directed in P.L. 108-136, OPM reported to Congress on “the cost of administrative fees agencies will pay to cover employees enrolled in a flexible spending account.” The report shows that 117,950 employees opened a health-care FSA and 18,178 employees opened a dependent-care FSA in 2004. OPM projects that more than 283,000 employees will have health-care FSAs and 43,627 will have dependent-care FSAs by 2007. Administrative fees are projected to be \$5.6 million for health-care FSAs and \$980,000 for dependent-care FSAs in 2004 and are expected to total nearly \$80 million for health-care FSAs, dependent-care FSAs, or both through 2007. According to OPM: “Employees benefit because untaxed contributions from their salaries are deposited into their FSA accounts, and the lower employee taxable income translates into agencies paying out less in Social Security and Medicare taxes ... because agencies pay less in taxes, they more than recover the cost of paying FSA administrative fees.”⁵⁹

⁵⁹ U.S. Office of Personnel Management, “OPM Reports to Congress on Agency Payments of Flexible Spending Account Fees,” Apr. 23, 2004. Available on the Internet at [<http://www.opm.gov>], visited Apr. 27, 2004. See also, Stephen Barr, “Agencies, Workers Benefit From Availability of Flexible Spending Accounts,” *The Washington Post*, Apr. 27, 2004, p. B2.

Employee Surveys⁶⁰

Section 1128 mandates annual surveys of employees by federal executive departments, government corporations, and independent establishments. OPM will issue regulations prescribing survey questions that will appear on all agency surveys so as to allow a comparison of results across agencies. Questions unique to an agency also may be included on the survey. The surveys will address leadership and management practices that contribute to agency performance. Employee satisfaction with leadership policies and practices, work environment, rewards and recognition for professional accomplishment and personal contributions to achieving organizational mission, opportunity for professional development and growth, and opportunity to contribute to achieving organizational mission also will be surveyed. Agency results will be available to the public. They also will be posted on the respective agency's website unless the agency head determines that doing so would jeopardize or negatively affect national security.

From time to time, OPM has conducted surveys of federal employees, but the surveys authorized by this provision would be conducted by agencies and particularly focus on their leadership and performance and employee contribution to agency mission. The provision does not mandate any remedial actions that an agency might want to take once the survey results are known. As to not posting survey results for reasons of national security, the term "national security" is not defined. OPM could address this issue in its regulations to implement the program which are anticipated in 2004.

Human Capital Performance Fund⁶¹

Section 1129 amends Part III, Subpart D of Title 5 *United States Code* by adding a new Chapter 54 entitled Human Capital Performance Fund. The legislation states that the purpose of the provision is to promote greater performance in the federal government. According to the law, the fund will reward the highest performing and most valuable employees in an agency and offer federal managers a new tool for recognizing employee performance that is critical to an agency achieving its mission.

Organizations eligible for consideration to participate in the fund are executive departments, government corporations, and independent agencies. The General Accounting Office is not covered by the chapter. The fund may be used to reward General Schedule, Foreign Service, and Veterans Health Administration employees; prevailing rate employees; and employees included by OPM following review of plans submitted by agencies seeking to participate in the fund. Executive Schedule (or comparable rate) employees; SES members; administrative law judges; contract appeals board members; administrative appeals judges; and individuals in positions which are excepted from the competitive service because of their confidential, policy-determining, policy-making, or policy-advocating character are not eligible to receive payments from the fund.

⁶⁰ 117 Stat. 1641.

⁶¹ 117 Stat. 1641-1645.

OPM will administer the fund which is authorized a \$500,000,000 appropriation for FY2004.⁶² Such sums as may be necessary to carry out the provision are authorized for each subsequent fiscal year. In the first year of implementation, up to \$50,000,000 (up to 10% of the appropriation, which is pending in H.R. 2673) will be available to participating agencies to train supervisors, managers, and other individuals involved in the appraisal process on using performance management systems to make meaningful distinctions in employee performance and on using the fund.

Agencies seeking to participate in the fund will submit plans to OPM for approval. The plans must incorporate the following elements:

- adherence to merit principles under 5 U.S.C. §2301;
- a fair, credible, and transparent performance appraisal system;
- a link between the pay-for-performance system, the employee performance appraisal system, and the agency's strategic plan;
- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

An agency will receive an allocation of monies from the fund once OPM, in consultation with the Chief Human Capital Officers Council, reviews and approves its plan.⁶³ After the reduction for training (discussed below), 90% of the remaining amount appropriated to the fund (\$405,000,000, appropriation pending in H.R. 2673) may be allocated to the agencies. An agency's prorated distribution may not exceed its prorated share of executive branch payroll. (Agencies will provide OPM with necessary payroll information.) If OPM were not to allocate an agency's full prorated share, the remaining amount will be available for distribution to other agencies.

⁶² P.L. 108-199, the Consolidated Appropriations Act for FY2004, enacted on January 23, 2004 (118 Stat. 339) provides an appropriation of \$1 million for the Human Capital Performance Fund. Obligation or transfer of the funding was contingent upon the enactment of the legislation to establish the fund within OPM. Funds shall not be obligated or transferred to any federal agency until the OPM director notifies and receives prior approval from the relevant subcommittees of jurisdiction of the Committees on Appropriations of OPM approval of an agency's performance pay plan. Such amounts as determined by the OPM Director may be transferred to federal agencies to carry out the purposes of the fund.

⁶³ The Chief Human Capital Officers Council would include an evaluation of the formulation and implementation of agency performance management systems in its annual report to Congress.

After the reduction for training, 10% of the remaining amount appropriated to the fund (\$45,000,000) as well as the amount of an agency's prorated share not distributed because of the agency's failure to submit a satisfactory plan, will be allocated among agencies with exceptionally high-quality plans. Such agencies will be eligible to receive a distribution in addition to their full prorated distribution.

Agencies, in accordance with their approved plans, may make human capital performance payments to employees based on exceptional performance contributing to the achievement of the agency mission. In any year, the number of employees in an agency receiving payments may not be more than the number equal to 15% of the agency's average total civilian full-time and part-time permanent employment for the previous fiscal year. A payment may not exceed 10% of the employee's basic pay rate. The employee's aggregate pay (basic, locality pay, human capital performance pay) may not exceed Executive Level IV (\$137,000 in 2004).

A human capital performance payment will be in addition to annual pay adjustments and locality-based comparability payments. Such payments will be considered basic pay for purposes of Civil Service Retirement System, Federal Employees' Retirement System, life insurance, and for such other purposes (other than adverse actions) which OPM determines by regulation. Information on payments made and the use of monies from the fund will be provided by the agencies to OPM as specified.

Initially, agencies will use monies from the fund to make the human capital performance payments. In subsequent years, continued financing of previously awarded payments will be derived from other agency funds available for salaries and expenses. Under current law (5 U.S.C. §5335) agencies pay periodic within-grade increases to employees performing at an acceptable level of competence. Presumably, funds for such within-grade increases could be used to pay human capital performance payments. Monies from the fund may not be used for new positions, for other performance-related payments, or for recruitment or retention incentives.

OPM will issue regulations to implement the new Chapter 54 provisions. Those regulations must include criteria governing:

- an agency's plan;
- allocation of monies from the fund to the agencies;
- the nature, extent, duration, and adjustment of, and approval processes for, payments to employees;
- the relationship of agency performance management systems to the Human Capital Performance Fund;
- training of supervisors, managers, and other individuals involved in the process of making performance distinctions; and
- the circumstances under which funds could be allocated by OPM to an agency in amounts below or in excess of the agency's pro rated share.

The Human Capital Performance Fund was proposed by President George Bush in his FY2004 budget. According to the budget, the fund "is designed to create

performance-driven pay systems for employees and reinforce the value of employee performance management systems.”⁶⁴ The effectiveness of agency performance management systems and whether the performance ratings would be determined according to preconceived ideas of how the ratings would be arrayed across the particular rating categories are among the concerns expressed by federal employees and their unions and representatives. Other concerns are that the fund could take monies away from the already reduced locality-based comparability payments and that the performance award amounts would be so small as to not serve as an incentive.

Other Personnel Provisions

Contracting For Personal Services⁶⁵

Title VIII, Subtitle D, Section 841, of P.L. 108-136 amends 10 U.S.C. §129(b) by adding a new subsection that authorizes the Secretary to enter into personal services contracts if the personal services (A) are to be provided by individuals outside the United States, regardless of their nationality, and are determined by the Secretary to be necessary and appropriate for supporting the activities and programs of DOD outside the United States; (B) directly support the mission of a defense intelligence component or counterintelligence organization of DOD; or (C) directly support the mission of the special operations command of DOD. The contracting officer for a personal services contract under this subsection is responsible for insuring that (A) the services to be procured are urgent or unique; and (B) it would be impracticable for DOD to obtain such services by other means. The requirements of 5 U.S.C. 3109 will not apply to a contract entered into under this subsection.

Transfer of Personnel Investigative Functions and Related Personnel of the Department of Defense⁶⁶

Title IX, Section 906, of P.L. 108-136 authorizes the transfer of the personnel security investigations functions and associated personnel from the Department of Defense Security Service (DSS) to OPM.⁶⁷ The functional transfer is contingent on acceptance by both the Secretary of Defense and the OPM Director. If so agreed, the transfer of DSS investigative personnel is mandatory, while the transfer of support personnel is at the discretion of the Secretary and the Director. If the transfer is made, the Director, in coordination with the Secretary, is to review all functions performed at the time of the transfer by DSS and make a “written determination regarding whether each such function is inherently governmental or is otherwise inappropriate for performance by contractor personnel.” Such functions may not be

⁶⁴ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government Fiscal Year 2004 Appendix* (Washington: GPO, 2003, p. 973).

⁶⁵ 117 Stat. 1552.

⁶⁶ 117 Stat. 1561-1563.

⁶⁷ This provision was Section 1104 in H.R. 1588, as passed by the House.

contracted to private contractors unless and until the Director makes a written determination that these are *not* inherently governmental or otherwise *not* inappropriate for contractor performance. If so decided, the contracting will be governed by the requirements of OMB Circular A-76.

Appendix

**Table 1. Career Groups and Pay Bands for
Nonsupervisory Employees, Science and Technology
Reinvention Laboratories, Department of Defense**

Career Group	Pay Bands			
	Level 1	Level 2	Level 3	Level 4
CG 1, Science and Engineering Research	GS 5-12	GS 13-15	Above GS-15	Not Applicable
CG 2, Professional and Administrative Management	GS 5-11	GS 12-13	GS 14-15	Above GS-15
CG 3, Engineering, Scientific, and Medical Support	GS 1-4	GS 5-7	GS 8-11	GS-12 and above to CG2
CG 4, Business and Administrative Support	GS 1-4	GS 5-7	GS 8-10	GS-11 and above to CG2
CG 5, College Cooperative Education Program	GS 1-5	GS 6-8	GS 9-11	GS-12

Source: U.S. Department of Defense, “Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program; Notice of Amendment of Demonstration Project Plans,” *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142. Career groups are referenced in the table as CG. GS refers to the General Schedule pay system.

**Table 2. Career Groups and Pay Bands for
Supervisory Employees, Science and Technology
Reinvention Laboratories, Department of Defense**

Supervisory Level	Pay Bands			
	Level 1	Level 2	Level 3	Level 4
CG 1, Science and Engineering Research				
Supervisor A	Not Applicable ⁶⁸	Not Applicable	Not Applicable	Not in CG
Supervisor B	Not Applicable	\$61,241-\$129,498	Not Applicable	Not in CG
Supervisor C	Not Applicable	\$61,251-\$150,865, but capped at SES level ES-4	Not Applicable	Not in CG
Supervisor D	Not Applicable	Not Applicable	Not Applicable	Not in CG
CG 2, Professional and Administrative Management				
Supervisor A	\$23,442-\$61,460	\$51,508-\$87,592	Not Applicable	Not Applicable
Supervisor B	\$23,442-\$66,961	\$51,508-\$94,098	\$72,381-\$129,498	Not Applicable
Supervisor C	\$23,442-\$79,629	\$51,508-\$110,682	\$72,381-\$150,865, but capped at SES level ES-4	Not Applicable
Supervisor D	\$23,442-\$94,098	\$51,508-\$129,498	Not Applicable	Not Applicable

⁶⁸ “Not Applicable” means that establishment of supervisory positions at these levels is not anticipated. If a supervisory position were established at such a level, the maximum rate of pay would be 20% above the maximum rate for the base level supervised. Pay would not exceed SES level ES-4. P.L. 108-136 authorizes a new pay-for-performance system for the Senior Executive Service (SES).

Supervisory Level	Pay Bands			
	Level 1	Level 2	Level 3	Level 4
CG 3, Engineering, Scientific, and Medical Support				
Supervisor A	\$15,214-\$28,868	\$23,442-\$40,014	\$32,158-\$61,460	Not in CG
Supervisor B	\$15,214-\$30,471	\$23,442-\$41,806	\$32,158-\$66,961	Not in CG
Supervisor C	Not Applicable	\$23,442-\$46,175	\$32,158-\$79,629	Not in CG
Supervisor D	Not Applicable	\$23,442-\$50,851	Not Applicable	Not in CG
CG 4, Business and Administrative Support				
Supervisor A	\$15,214-\$28,868	\$23,442-\$40,014	\$32,158-\$55,936	Not in CG
Supervisor B	\$15,214-\$30,471	\$23,442-\$41,806	\$32,158-\$61,021	Not in CG
Supervisor C	Not Applicable	\$23,442-\$46,175	\$32,158-\$66,961	Not in CG
Supervisor D	Not Applicable	\$23,442-\$50,851	Not Applicable	Not in CG

Source: U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142.

Table 3. Selected Features of the Pay-for-Performance Evaluation System, Science and Technology Reinvention Laboratories, Department of Defense

Allows for more employee involvement in the evaluation process, increases communication between supervisor and employee, promotes a clear accountability of contribution by each employee, facilitates employee progression by linking individual employee performance to mission accomplishment, and provides an understandable basis for salary and structural changes.
At the beginning of the rating cycle, employees and supervisors will jointly develop performance objectives that reflect the types of duties and responsibilities expected at the respective pay band level.
The performance objectives ... should be in place within 30 days from the beginning of each rating cycle.
Performance factors are used to evaluate accomplishment of performance objectives The DOD component has the discretion to weight performance factors based on the importance in accomplishing an individual's performance objectives.
The seven performance factors used to evaluate accomplishment of performance objectives are as follows: Technical Competence/Problem Solving; Cooperation/Teamwork; Communication; Customer Care; Resource Management; Leadership/Supervision; and Contribution to Mission Accomplishment.
Benchmark performance standards are descriptors that are used to measure, evaluate, and score each performance factor with regard to the accomplishment of performance objectives The descriptors for these benchmark performance standards indicate the level of performance appropriate for the high end of each score range for the performance factor. These performance standards will assist the supervisor in determining the percentage of the performance factor that the employee actually attained.
The duration of the rating cycle will be 12 months [October 1 through September 30].
The supervisor may provide on-going feedback as necessary to employees on how well they are accomplishing performance objectives.
At the end of the rating period, the supervisor may request that the employee provide narrative comments describing accomplishment of his/her performance objectives throughout the year.
Performance payouts will be funded from pay pools. The amount of money available within a pay pool for basic pay increases is determined by the general pay increase (GPI) and the money that would have been available for quality step increases, within-grade increases, and promotions between grades that are banded. Performance incentive payments are funded separately, but the amount of money available for performance incentive payments must be equivalent to a minimum of 1% of total salary dollars (typically 1.3% to 1.8 %).
Typically, pay pools may range from as small as 25 to as large as 500 employees. Each DOD component shall establish a pay pool manager for each pay pool. Generally supervisors will be placed in a pay pool separate from their employees.

Following a review of the employee's accomplishments, the supervisor will score each relevant performance factor by assigning a value to each performance factor. The overall score is the sum of the individual performance factor scores.
<p>Score ranges and Shares for Payout:</p> <p>a score of 98-100 = 13, 14, 15, or 16 shares</p> <p>a score of 95-97 = 11 or 12 shares</p> <p>a score of 91-94 = 9 or 10 shares</p> <p>a score of 86-90 = 7 or 8 shares</p> <p>a score of 81-85 = 5 or 6 shares</p> <p>a score of 66-80 = 3 or 4 shares</p> <p>a score of 51-65 = 1 or 2 shares</p> <p>a score of 0-50 = 0 shares</p>
The share value is calculated by first multiplying each individual employee's basic pay salary by the number of shares awarded to the employee. This can be referred to as (Salary x Shares). Then the amount of money in the pay pool is divided by the sum total of (Salary x Shares) for all employees to derive the share value.
An employee will receive a performance payout as a percentage of current basic pay. The employee's total performance payout is the share value multiplied by the employee's end-of-rating cycle basic pay salary multiplied by the number of shares earned by the employee.
A performance review board or an equivalent process for oversight will be established for reviewing supervisors' preliminary scores and recommendations for the number of shares to be granted to individual employees.
An employee may grieve the performance score.
Informal employee performance reviews will be provided on an on-going basis, so that corrective action, to include placing an employee on a performance improvement plan (PIP), may be taken at any time during the rating cycle.

Source: The statements in the table are quotations from U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142.

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